## IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARCHIE K. BABSON and VICTOR J. TRIAL,

Appellants,

v.

UNITED STATES OF AMERICA.

Appellee.

NO. 18410

### CONSOLIDATED BRIEF OF APPELLEE

### FILED

SEP 18 1963

FRANK H. SCHMID, CLERK

CECIL F. POOLE United States Attorney

FREDERICK J. WOELFLEN
Assistant United States Attorney

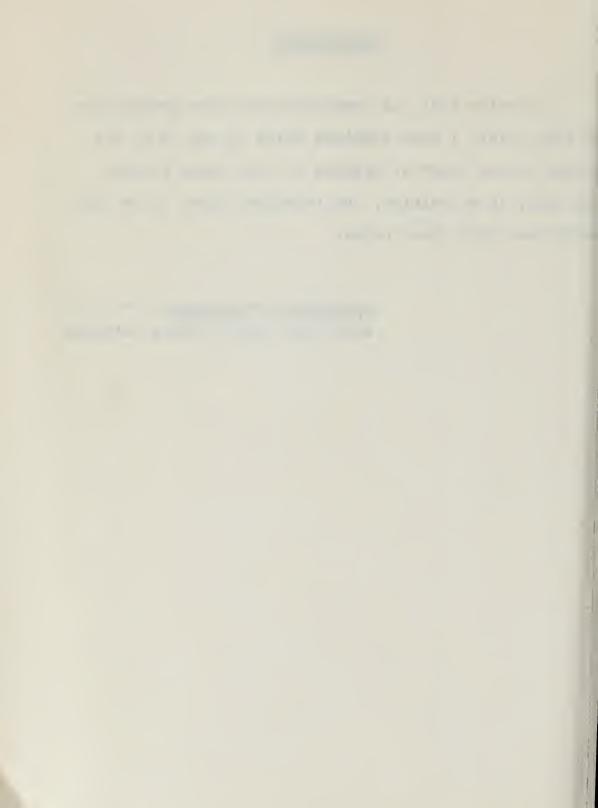
Attorneys for Appellee United States of America



### CERTIFICATE

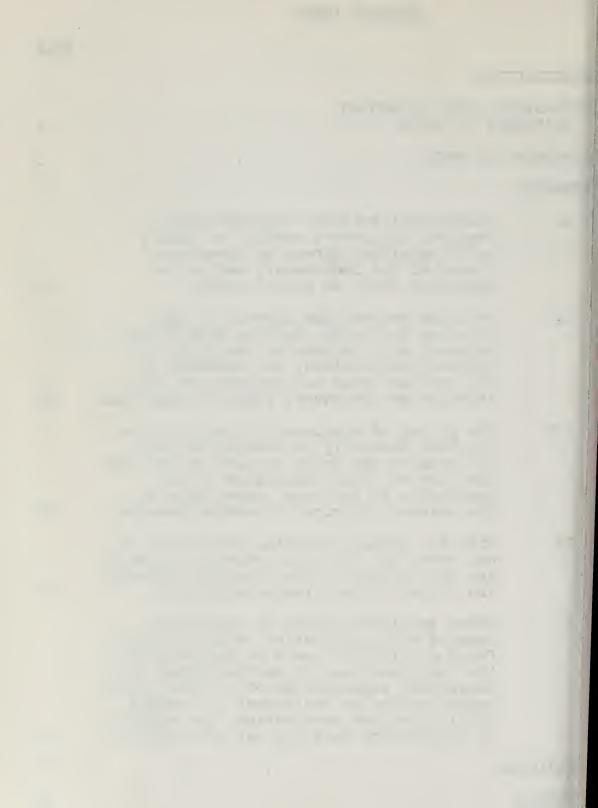
I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDERICK J. WOELFLEN
Assistant United States Attorney



### SUBJECT INDEX

															Page
JURISDICT:	ION		•	•	•	•	•		•	•	•	•	•	•	1
EXPLANATO STATEME				RDI	ENG .							•			2
STATEMENT	OF F	ACTS	3	•	•	•	•	•	•	•	•			•	3
ARGUMENT		•	•	•	•	•	•	٠	•	•	•	•	•	•	13
I.	Substantial evidence overwhelmingly supports the jury's verdict of guilty as to Appellant Babson on seventeen counts of the indictment; and as to Appellant Trial on three counts.									13					
II.	Colloquy between the foreman of the jury and the Court, held in open Court, pursuant to a request of the jury, for further instructions, and attended by all parties, does not violate any substantive or procedural right of appellant.									23					
III.	The giving of supplemental instructions relating generally to conspiracy does not require the Court to also re-instruct the jury on other principles of law applicable to the case, especially in the absence of proper objection thereto.									26					
IV.	With all counsel agreeing thereto it is not error for the trial court to instruct the jury in part before closing arguments and in part after closing arguments.							29							
V. Where Appellant Victor J. Trial was charged with substantive counts of mail fraud within five years of the return of the indictment and of participating in a conspiracy beginning prior to five years before return of indictment but ending within the five year period, the statute of limitations does not bar prosecution.						32									
ONCLUSION	V	•	•		٠	•	•	•	•	e	٥	•	•	•	34
PPENDIX		•	•			•	•		•	•	•	•		0	35



### TABLE OF CASES AND AUTHORITIES CITED

	Page					
Allen v. United States, 186 F.2d 439	23					
Allis v. United States, 155 U.S. 117	23					
Grunewald v. United States, 353 U.S. 391	32					
Northern Securities Co. v. United States, 193 U.S. 197	25					
Russell v. United States, 288 F.2d 520	26					
Sherwin v. United States, Unreported, 9th Cir., decided June 11, 1963	26					
Speak v. United States, 161 F.2d 562	28					
OTHER AUTHORITIES						
Federal Rules of Criminal Procedure:						
Rule 30	27, 30					
Rule 52(b)	28, 30					
Jnited States Code:						
Title 18, Section 371	1					
Section 1341	1, 22					
Section 3282	32					
Title 28, Section 1291	1					
Section 1294	1					

## IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARCHIE K. BABSON and VICTOR J. TRIAL,

Appellants,

v.

NO. 18410

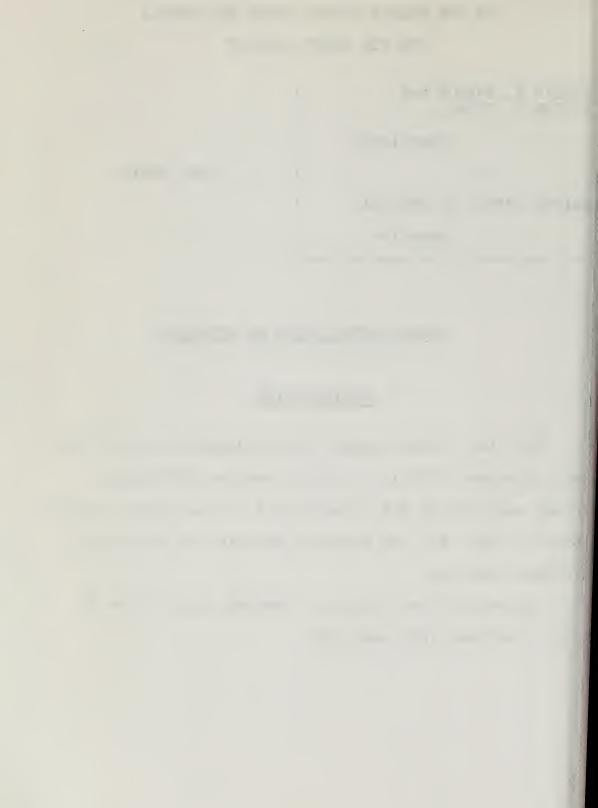
UNITED STATES OF AMERICA,
Appellee.

### CONSOLIDATED BRIEF OF APPELLEE

#### JURISDICTION

This is a timely appeal from judgment of conviction for violation of Title 18 U.S.C. Section 1341 (Mail Fraud) and Section 371 (Conspiracy) in the United States district Court for the Northern District of California, outhern Division.

Jurisdiction on appeal is invoked under Title 28 .S.C. Sections 1291 and 1294.

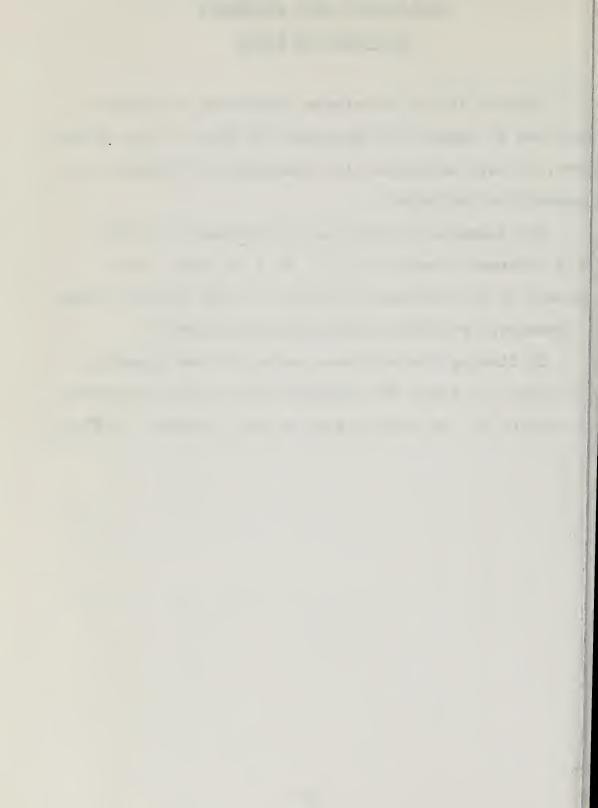


# EXPLANATORY NOTE REGARDING STATEMENT OF FACTS

Because of the voluminous transcript references required to support the Statement of Facts of the Government, we have collected all transcript references in an Appendix to the Brief.

The Appendix is keyed to the Statement of Facts by a reference number, e.g. 1, 2, 3, 4, etc., which appears in the Statement of Facts at each juncture where a transcript reference would ordinarily occur.

By finding the reference number in the Appendix, the reader is given the collected transcript references pertaining to the facts stated in the Statement of Facts.



#### STATEMENT OF FACTS

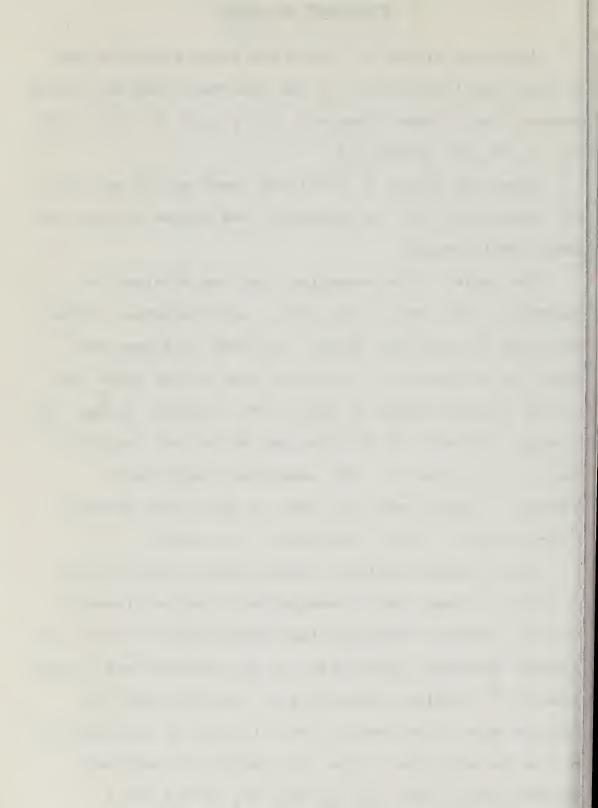
Appellant Archie K. Babson was found guilty by jury on count one (Conspiracy) of the indictment and on fifteen counts of mail fraud (Counts 2, 3, 4, 5, 6, 7, 10, 12, 13, 14, 15, 16, 18, 20 and 21).

Appellant Victor J. Trial was found guilty on count one (Conspiracy) of the indictment and counts sixteen and twenty (Mail Fraud).

The basis of the conspiracy and the substantive charges of mail fraud arise from a correspondence course conceived by Appellant Babson, operated by Babson and others in corporate or fictitious name status under the various business names of United Jet Training, United Jet Schools, National Jet Training and United Jet Institute.

(Exs. 1, 2, 3, and 4). The conspiracy began about February 1, 1956, under the name of United Jet Schools, a corporation. (See: Indictment, count one).

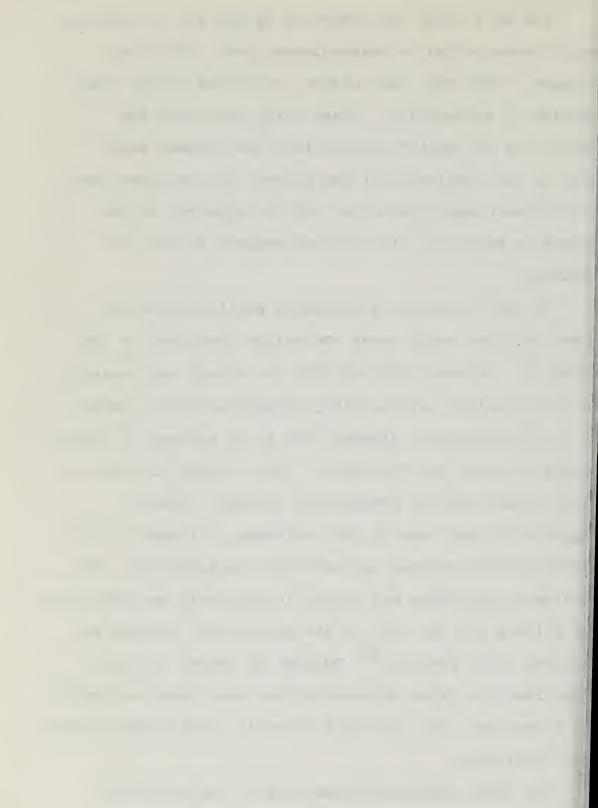
These various business establishments were created to conduct a home study correspondence course allegedly for the purpose of training individuals how to become jet airplane mechanics specialists in the aviation and airline industry. Various categories of jobs for which the students were to be trained are set forth in the exhibits on file in this case. [See, for particular reference, Exhibits 14, 17, 30, 43, 23, 158, 54, 57 and 167.]



The mail fraud was conceived by the use of business reply cards mailed to householders, post office box holders, rural mail box holders, or placed on the windshields of automobiles. These cards described the course and the qualifications that the student would have on the completion of the course, the salaries they could obtain upon graduation and the approval of the course by major jet airlines and members of the jet industry.

In many instances the general public filled out these business reply cards and mailed them back to the school. Between 1956 and 1957 the school was located in San Francisco, at the old International Air Terminal of the San Francisco Airport, and at an address on Linden Avenue in South San Francisco. Upon receipt of business reply cards from the prospective student, "school registrars," who were in fact salesmen, followed up and personally interviewed and enrolled the applicant. The enrollment procedure was unique in that only one interview vas allowed and the wife of the prospective student was required to be present. During the course of these Interviews the false representations were made concerning the course and that for which it would qualify the student upon completion.

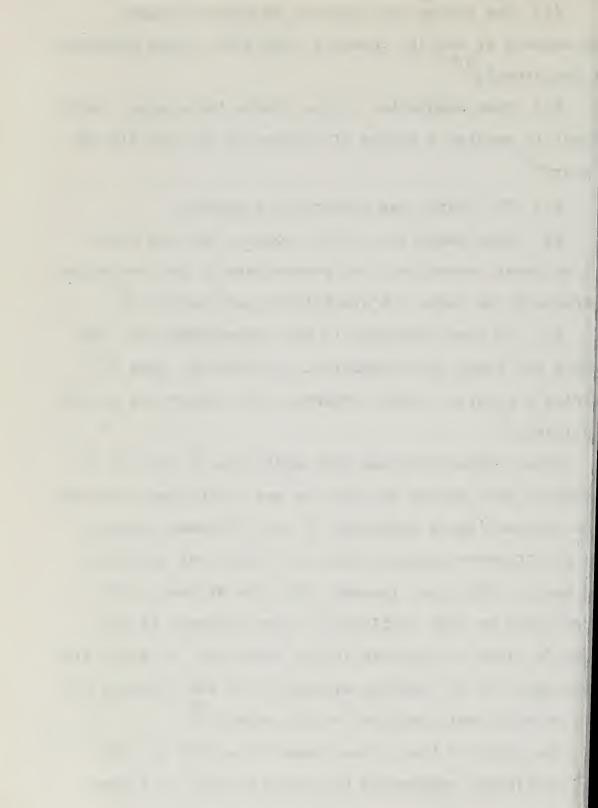
The false representations made by the registrars vere:



- (a) The course was approved by major airlines and members of the jet industry, who were hiring graduates of the school; 4/
- (b) Upon completion of the course the student could expect to receive a salary of between \$8,000 and \$15,000 a year;<sup>5</sup>/
  - (c) The course was nationally accepted;
- (d) Upon completion of the course, the men would not be merely mechanics, but supervisors of jet mechanics, inspectors and turbo jet specialists and analysts; 6/
- (e) In some instances it was represented that the course was based upon classified information, thus requiring a security check concerning the background of the applicant.

pplicant that during the time he was taking the corresponence course (which consisted of two different courses, ne of fifty-two lessons under the United Jet Institute nd one of thirty-two lessons under the National Jet) here would be made available to them seminars at the chool's place of business in San Francisco, at which time here would be jet engines available for the students to brk on with tools supplied by the school.

The price of the course ranged from \$400 to \$600. The "registrar" endeavored to obtain as much of a down



payment on the course as would be possible from the student, securing the balance on a promissory note from the applicant. Thereafter, the student received his lessons from which he prepared examinations which were sent to the school for grading.

Of the 1400 students who enrolled in this course, few, if any, were mechanically inclined. They had such backgrounds as logger, painter, lumber worker, service station lubrication man, carpenter, cement finisher, upholsterer, baggage handler, insurance claims adjustor, and apprentice bricklayer. In many instances, the students enrolled by the schools had at most, a high school education, with little or no mechanical background. After enrollment the student, no matter what his background, received grades in his examinations ranging from 85 percent to 100 percent. 11/

Contrary to the representations made by the "registrars, by the appellant Babson, and by the appellant Trial, the course was not approved by any airline or members of the let industry. United Airlines would not recognize the school or approve the course. 12/ Neither did other usiness in aviation or jet industries. "Classes" were, nother main, "bull sessions" conducted by student nstructors. An airplane engine was supplied for o-called "classroom work"--in a burnt out and damaged ondition--a "basket job," (bordering on junk),

-----\_\_\_\_\_

impracticable for use in demonstrations. At no time were any tools supplied to the students for the purpose of working on any jet engine. From expert testimony it was established that the course, as prepared, could not qualify a man to become a supervisor jet specialist or instructor in jet engines, but at the most would qualify the individual as an apprentice mechanic earning approximately \$2.20 an hour.

The course was completely inadequate and would not provide any basis for hiring a man without formal on-the-job training. Contrary to the representations made by the appellants Babson and Trial, both through their salesmen and personally, there were no such classifications as a jet specialist in the airline industry. Supervisors of maintenance were not hired off the street and only attained the position after five years of work on the job and then only at a salary of from \$8,000 to \$10,000 a year. Despite the highly glowing representations of the appellants, made in their mailed brochures and literature and through their "registrars," no individual could become qualified as a jet mechanic through a correspondence course; the ourse having little value except as conversational nowledge. 15/ The course was replete with errors. (Record, 112).

Through United Airlines' individual program of trainng it would take a man four years to obtain the status of

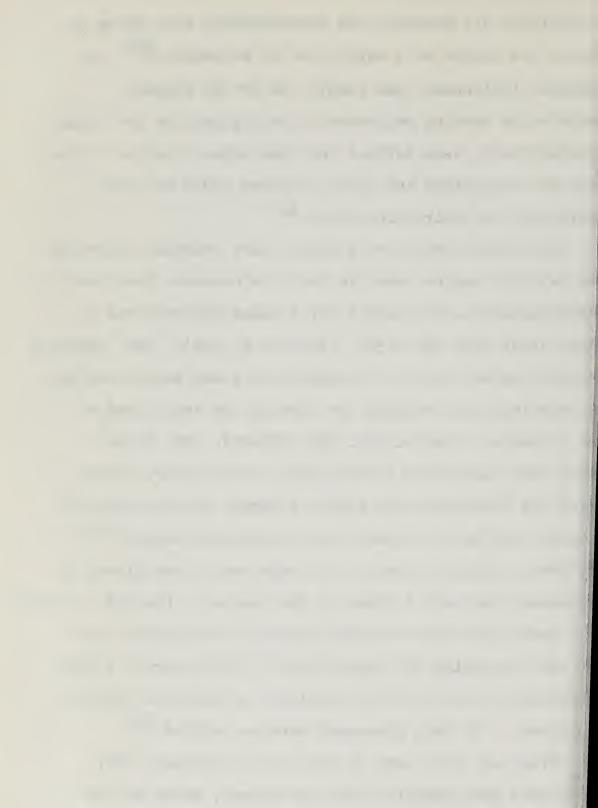


a qualified jet mechanic and approximately five years to obtain the status of a supervisor of mechanics.  $\frac{16}{In}$  numerous instances, upon completion of the course, individuals seeking employment with airlines or jet engine manufacturers, were advised that the school and the course were not recognized and their training would be of no assistance in their being hired.  $\frac{17}{In}$ 

The course which the students were studying concerned the J-34 jet engine, when in fact the obsolete burnt out engine placed in the school for alleged job work was a model other than the J-34. (Record, p. 154). The "training course" was written by co-conspirator James Porter who was in many instances writing the lessons one step ahead of the students. (Record, pp. 739, 741-42). Mr. Porter wrote the course from a book given to him by Mr. Babson, which was a declassified manual authored by Westinghouse company, for use as a parts and maintenance manual. Is In Porter lifted material from this manual and placed it in context but out of order in the lessons. (Record, p. 1140)

Among the representations made to the students was ne that following the completion of their course, a free lacement service would be available to them for securing mployment. No such placement service existed. 19/

From the early part of 1956 until September 1957, student had graduated from the school, which had an

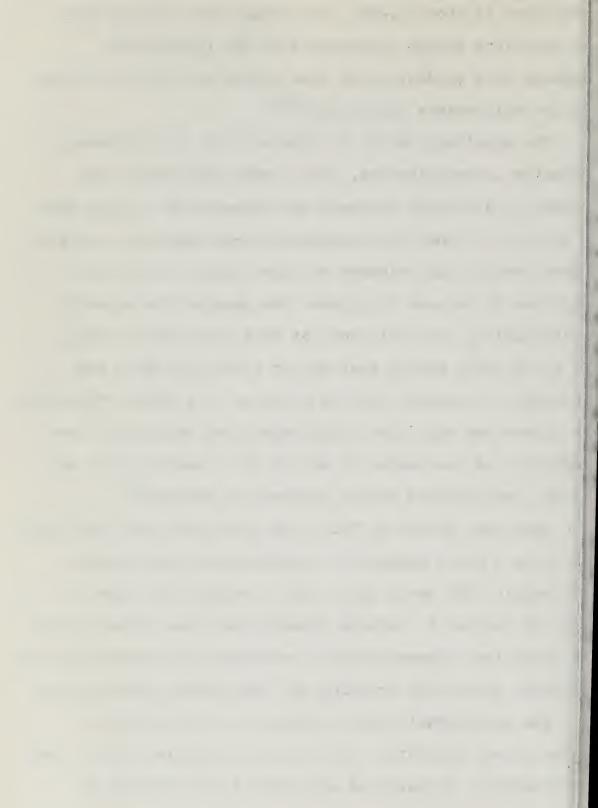


enrollment of about 1,400, even though the salesmen and the appellant Babson represented to the prospective students that graduates had been placed with major airlines and jet maintenance facilities. 20/

The appellant Archie K. Babson hired all personnel, including co-conspirators, all of whom admittedly sold courses to different students and represented to them some, if not all, of the false representations heretofore recited. Babson trained the salesmen and gave them a "sales kit" which was to be used to impress the prospective students of the quality and efficiency of this home study course. All of the mail matter sent out in connection with the procuring of students and the advising of students regarding the course and what they could expect and anticipate upon completion of the course by way of job classification and ralary, was prepared and/or approved by Babson.

Appellant Victor J. Trial was associated with appellant labson as a sales manager for approximately nine months rom August 1956 until April 1957. During this time he old 125 courses to various students and made various false nd fraudulent representations regarding the classifications, alaries, on-the-job training and employment opportunities.

The Government's first witness at the trial was a tudent, Jack Giolitti. Mr. Giolitti testified that he was watchmaker. He enrolled with United Jet Training in



uly of 1957, after receiving a post card in the mail. (Ex. Upon receipt of that post card he went directly to 2). hited Jet and conferred with Babson. Babson told him the rice of the course was \$435 of which \$145 would be a down lyment; Babson falsely represented to Mr. Giolitti that judent graduates were working at Aerojet and T.W.A. and the hool had placed these graduates in these positions. bson falsely represented to Mr. Giolitti that Mr. Giolitti uld work as a jet specialist, supervising men and not working the assembly line; that the airlines were interested in bson's graduates; and that Mr. Giolitti could obtain a salary to \$1,000 a month upon completion of the course. Mr. Giolitti gned for the course and paid for the course in full. . Giolitti's testimony which appears at Record, pp. 71-96; lated primarily to count two of the indictment. Babson was

Babson sent out or authorized the sending out of business oly post cards. These cards represented that Babson wanted by highly qualified men for whom he could obtain jobs of supervisory capacity at salaries far in advance of the en going rate.

nvicted upon count two.

The truth of the matter was that Babson sent out or thorized the sending out of business reply post cards for to ever checking with the airlines of jet aircraft flustry the salaries they were paying or their job

------\_\_\_\_\_\_ 

qualifications. Babson had, in fact, in preparing the alleged qualifications for prospective students, lifted in toto the contents of a qualification chart he had previously used in a correspondence course for practical nursing. This was the only aptitude guide ever used by Babson. (Exs. 324, 325). Babson represented to the Better Business Bureau in 1956 that the course was approved by the vice-presidents of major airlines and maintenance companies, whereas no such approval was ever secured. (Ex. 277). On many occasions Babson represented to students and salesmen that necessary equipment would be secured for classrooms, whereas none was secured except for a damaged, burnt and recked jet engine which he procured in a Los Angeles junk rard. (Record, p. 755). In much of the correspondence ent out to prospective students and following their enrollent, there were no dates placed thereon. (Record, p. 1677). abson, in an attempt to sell the course, constantly extorted is students to paint a rosy picture of the course and its dvantages and to use anything by way of ammunition to sell he course. (Record, pp. 1445-1446). [Babson's sales echnique is fully set forth in Exhibit 161]. An additional ales presentation containing many of the misrepresentations ent through the mail and made by the "registrars" is khibit 271. Of particular note is an alleged qualification nart (Ex. 167) which lists innumerable supervisory jobs

could be obtained by the student. All of these were n to be false.

Finally, after some controversy in 1957, the various anies of United Jet Schools, United Jet Institute, and onal Jet Training moved from San Francisco to Tampa, Ida. Despite the representations made to the prospectudents to induce their enrollment, no student was hired to a job and no student ever received a salary presented to them in the mailed business reply cards, sures and literature.

Like his co-appellant Babson, Appellant Victor J. Trial nds the evidence in this case does not support the jury's ng of guilt. Appellee submits and will demonstrate to ourt that the jury's finding is in accord with the evidence. Irial was a salesman from August 1956 to May 1957, rd, p. 507). He sold 125 courses during this period. cd, p. 1507, Ex. 315 through 322). There is direct mony from three witnesses relative to his misrepresentations. are Royce Herrier (Record, pp. 589-601) Robert Revo (Record, 1.7-622) and Robert Lams (Record, pp. 626-635). Herrier and were placed in contact with appellant Trial through the media mail. (Record, pp. 589-627). In one instance an advertisenserted by appellant Babson (Ex. 57) was a source of sudent coming into contact with Trial (Record, p. 590). As vall cases, the prospective student's wife was present. od, pp. 591, 618, 627). In the case of Herrier, appellant Tria



the following representations:

(1) Shop training available and student would be able ork on engines (2) there would be good training (3) student d be so qualified he could demand a job as a supervisor instructor (4) wages would be around \$1,000.00 to \$1,200.00 nth (Record, pp. 592, 593, 604, 605). Trial gave to Herrier rm letter showing salaries that the student would receive. 209). Following enrollment by Trial, Herrier received rature in the mail concerning free placement service offered student. (Record p. 598, Ex. 213).

Trial enrolled Robert Revo (Record p. 618, Ex. 226).

rolling Revo, Trial made the following false representa
: (1) the course would train him to be an inspector or

visor (2) he could earn \$10,000.00 to \$12,000.00 per year,

the top airlines would honor this school (Record p. 619),

he course was \$500.00. (Record p. 620). Thereafter, Revo

ved correspondence from United Jet Institute (Ex. 230).

enrolling, it took 9 months to receive the first lessons.

rd pp. 620-625).

Robert Lams was likewise enrolled by Trial (Record p. 628). rolling Lams, after Lams had sent a business reply card to United Jet Institute (Record p. 627), Trial made the wing false representations: (1) upon graduation he would specialist earning \$1,300.00 a month (2) the opportunities

and the second s \_\_\_\_\_ -----

employment were great--United Air Lines was a source employment; (3) the school would help students get a (Record, pp. 629-630, 634-636).

After enrolling, Lams contacted United Air Lines
Pan American. He found that Trial's representation
It United Air Lines would hire United Jet Institute
dents was false, as this airline did not endorse the
ool and had no intention of hiring any of its students
cord, pp. 631, 633).

The representations made by Trial to these three men e completely false.

Trial assisted in this fraud and scheme by passing business reply cards (Ex. 17 (Record, pp. 1527-1529). nough Trial asserts he was unfamiliar with what type background the student was to have for enrollment, yet admits he was familiar with Babson's sales presentation 161) wherein the objectives of the course are set (Record, pp. 1526-1527).

Trial enrolled an apprentice bricklayer, a sausage er, (Record p. 1539), a restaurant owner (Record, p. ), a greens keeper for a golf course (Record p. 1546) tother individuals (Record, pp. 315-322) whose backand clearly indicates they were not of the qualifications aptitude to enroll in such a course.

----\_\_\_\_ \_\_\_\_\_\_

Trial was closely associated with Babson before the ture as a salesman in a correspondence course. (Record p. 1523 representations were those of Babson. He placed in the mail udulently contrived business reply cards.

The evidence against Trial was sufficient to sustain conviction. It is significant that the jury convicted him the substantive counts of the indictment in which he alone was defendant of the false representations in Count 16, dealing h his sale of the course to Robert Revo and Count 20 relative his enrollment of Royce Herrier. Having made false representons in these two instances, he also became part and parcel the conspiracy count, Count 1 as set out in paragraphs 3(A) (C) (D) and paragraphs 4(a) (c) (1) and (k) of Count 1. Although Trial claims he was no longer associated with son, he was operating a franchise of National Jet Training se for 18 months after leaving United Jet Institute.

## ARGUMENT

SUBSTANTIAL EVIDENCE OVERWHELMINGLY SUPPORTS THE JURY'S VERDICT OF GUILTY AS TO APPELLANT BABSON ON SEVENTEEN COUNTS OF THE INDICTMENT; AND AS TO APPELLANT TRIAL ON THREE COUNTS.

(NOTE: Since much of the evidence in the Record
fects both Babson and Trial, the Government has combined
a arguments as to sufficiency of the evidence on all
ements of the crime in this section. We therefore now
swer Specifications of Error 1 and 2 of Appellant Babson,
wit: that the Government failed to prove a conspiracy existed
d that the evidence was insufficient to support a finding
criminal intent on the part of Babson, and Specifications
Error 1 and 2 of Appellant Trial, to wit: that there is
substantial evidence to support the verdict against
ial on the substantive counts (counts 16 and 20) and that
ere is no substantial evidence to support a finding that
lal was involved in the conspiracy).

Appellant's brief for Babson asserts, without justifiable port, that the jury's verdict of guilty is contrary to evidence, either as to the conspiracy count (count 1) the substantive counts (counts 2, 3, 4, 5, 6, 7, 8, 10, 13, 14, 15, 16, 18, 20, and 21).

Like the Israelites seeking a scapegoat, Babson seeks cast the blame for the failure of his course and

THE RESERVE THE PARTY OF THE PA  instructional effort upon another, James Porter, a coinspirator. This feigned attempt to extricate himself from
isponsibility runs through Babson's entire testimony on
irect and cross-examination; the evidence clearly demonirates that his attempts to establish his innocence were
tile. The trial record, including exhibits and his
stimony, which covers in excess of 1,600 pages, directly
ints to his mire of involvement in the fraudulent scheme.

y as he did to place the mantle of blame on James Porter,
is clear that Babson's nefarious activity was begun
fore Porter came upon the scene.

Mr. Porter was hired to write the course in March of

ission, no one ever checked with the airlines or the ation industry until July or August of 1956 to determine salaries then being paid by them to aviation and jet hanics, the job classification and the experience or ining required for hiring employees. (Record, pp. 1589, 5). However, on February 26, 1956, prior to Porter's ociation with Babson, Babson set forth his initial seed fraud in an advertisement placed in the San Francisco miner (Ex. 57). In this advertisement Babson represented t students would obtain specialist status and would have a placement upon completion of his course and that his rse was approved by the airline and aviation industry.

-----The state of the s 

The myriad of fraudulent representations directly ttributable to Babson are replete throughout the record, ut all one has to do to refute Babson's assertion that is conviction is unsupported by the evidence, is to look t Exhibit 161. Exhibit 161 is Babson's sales "pitch" presentation) as given to his "registrars," wherein he tates the leads are "qualified"--this means that the prollees are qualified to take the course. As previously ated, the record discloses that the individuals enrolled re not qualified, had little mechanical background, had ly a high school level of education and were loggers, rmers, cement finishers, upholsterers, baggage handlers, prentice brick layers, and an insurance claims agent. In hibit 161, Babson suggests to his "registrars" that "they ay the part of qualified and well trained registrars." also suggested in Exhibit 161 that mention of placement rvice be made to the prospective student. This represention of job placement was without foundation and primarily signed to induce the student to buy the course. In this me sales presentation, Babson infers govermental approval the course by suggesting to the "registrar" that the dent be questioned relative to any involvement in versive activities. Further evidence of Babson's udulent intent is Exhibit 158a, a picture of a large air shop, heavily equipped and staffed. At the top of

In the second se 

nufacturer, Maintenance and Military." United Jet Institute, mufacturer, Maintenance and Military." United Jet Institute was never so equipped and staffed. Similarly of ote, Appellant Trial's testimony shows that no student is given an opportunity to fully look at the sales kit in it. 158) of which the picture, Exhibit 158a, is a part. Is respectufully suggested that the photograph, Exhibit 8a, was principally inserted into the sales kit to audulently misrepresent to prospective students that the ene therein depicted was the facility of United Jet aining, United Jet Institute and National Jet Training, if thus entice a prospective student to enroll in the arse at a tuition ranging from \$400 to \$600.

A letter to United Airlines, Exhibit 286, is further idence of Babson's participation in this fraudulent scheme. Is letter was written by Babson in June 1956. In the steer he states that the course was training jet specialists would cover the latest type of jet engines. Contrary this representation the record shows that the corresponce course covered, at the most, a J-34 Westinghouse line. This engine was obsolete. Exhibit 286 further constrates appellant's outright and reckless proclivity making fraudulent misrepresentations by his assertion at leading manufacturers were assisting on engineering and on the preparation of the training manual. No

inufacturer or airline officials were consulted or conicted relative to this course until July or August of 1956.
ie only source material for the literature and lessons
iat the students received was a parts and maintenance
inual (Ex. 244) which was given to Porter by Babson in
irch of 1956. James Porter lifted much of the information
intained in Exhibit 244 in preparation of the lessons
x. 62).

Exhibit 271 is a sales presentation of co-conspirator, ed Lee. (Récord, p. 839). Babson gave his imprimatur the fraud by approving Lee's sales presentation. (Record, 1614). In this presentation, Lee, a co-conspirator, aims that hundreds upon hundreds of engineering experts m major aeronautical firms were giving up-to-date formation to the school. The record is completely devoid such cooperation and assistance, and the fraud is clearly tablished by Babson's own admissions that he at no time is had any personal contract with the airlines.

In Exhibit 271, Lee asserts that most of the students olled in the course had seventeen years experience with lines. The only student known to be enrolled in the rse who was associated with the airlines was the witness, nard Haynes. Lee repeats Babson's assertion concerning high educational background and qualifications of the lents that were and would be enrolled in the course.



; is interesting to note that the witness Pollard, an ficial of the United Airlines, testified that the course is not approved or recognized by that airline. (Record, . 1174-1176). Despite these assertions, which were approved Babson and his direct representations and ratification such statements, as to the quality and nature of the urse, the record is uncontradicted that the only tools to sist Porter in preparing the course were Exhibit 244, ich he received from Babson. (Record, p. 336). Addionally, the record shows that the in preparing the lessons, rter was one step ahead of the students in drafting ese documents. (Record, p. 742). An additional feature ling to appellant's knowledge of the fraudulent activities ried out in this organization was his refusal to fire defendant, Gordon L. Braden. (Record, p. 473). When . Jenny Speights in 1957 called to his attention in a ter, the fraudulent misrepresentations made by that ividual, appellant retaliated by calling the Better iness Bureau "a bunch of hicks." (Record, pp. 1618-9; Exs. 169, 170). When Porter complained to the ellant that his business reply cards and other mailable ters showed that the students would obtain a salary of 000 to \$10,000 (Record, pp. 763-764) appellant continued send the business reply cards containing these false resentations. The record is replete with representations by Babson that the school would have an engine for the

the state of the same of the s 100 - 100 - 110 - 110 - 110 

udents to work on and that tools would be provided.

ecord, pp. 601, 784A, 836-837, 1007-1008). The only
gine that was supplied was a basket job, amounting to
nk, as was testified to by his co-defendant and co-conirator, Gordon L. Braden, and Appellant Victor J. Trial.

ecord, pp. 1394, 1535).

The record is amply supported to the effect that most not allof the documents sent through the mail under caption United Jet School, United Jet Institute, United Training and National Jet Training contained fraudulent representations. Babson either authored or approved all these documents. (Record, pp. 1602, 1614-1618). He olled students and sent out such business reply cards ore James Porter joined them and even before the course written. He likewise had not verified the contents of se representations with any representative of the airs or aviation industry. (Record, p. 1589). Babson told lents Donald Freeman and Jack Giolitti in the middle of 1956 he had placed graduates of the school with jet and T.W.A. (Record, p. 78). By his own testimony e were no graduates from the school as late as September (Record, p. 1620). In Exhibit 277, written by Babson uly of 1956, Babson informed the Better Business Bureau os Angeles that the course was airline approved. The imony of witnesses Pollard, Martin, Hepburn, Champeau



d Rieger refutes such approval. (Record, pp. 943, 965, 94-1103, 1141, 1154). Again in Exhibit 277, Babson stated course was approved by the vice-presidents in charge maintenance for manufacturers and airlines. This ertion is an outright fraudulent misrepresentation, as ther Haynes, Porter, or anyone else on behalf of Babson his several schools, according to appellant's own timony, until July or August of 1956, contacted any or airline or jet manufacturer. (Record, p. 1605).

The record in this case, voluminous as it may be, is lete with assertions made by Babson that conclusively ablish his participation in the fraud and, in fact, his ation of this scheme and artifice to defraud. These resentations are that the trainees would be supervisors cord, p. 499); that jobs would be provided (Record, pp. , 850); there would be job placements (Record, pp. 696, , 1001); students would be better than mechanics and ssified as jet specialists (Record, pp. 1002, 1047); stance for employment would be provided all over the led States (Record, p. 1051); that students would have ter than average salaries (Record, p. 994); and that s similar to Exhibits 17 and 18 were supplied to the Ismen by Babson by the thousands. (Record, pp. 833-834,

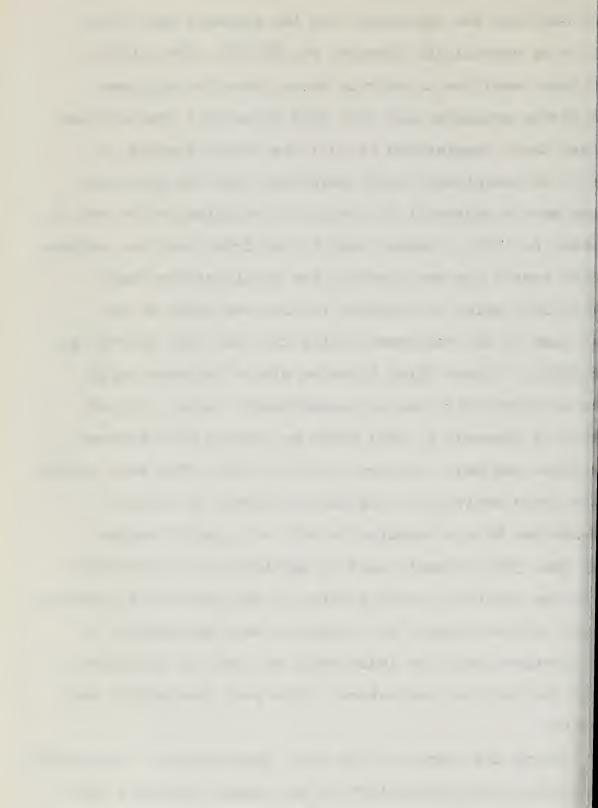
Co-conspirators Lee and Nau and the co-defendant Braden

5.

-----\_\_\_\_\_  stified that the appellant told the students that they re to be specialists (Record, pp. 844-846, 994, 1428); at there would be a security check; that the airlines re hiring graduates and were told to paint a rosy picture d use their imagination to sell the course (Record, p. 45). Co-conspirator Oller testified that the Appellant oson was in charge of all publicity relating to the school. ecord, p. 1476). Babson told Victor Trial that the purpose this course was set forth in the qualification chart, libit 167, which is likewise further set forth on the st page of the salesmens' sales kit (Ex. 158; Record, pp. 6-1527). Victor Trial likewise placed business reply ds on windshields and in householders' boxes, such as ibit 17 (Record, p. 152) which he secured from Babson. did Lee and Nau. (Record, pp. 833, 995). The very nature the fraud activity on the part of Babson is clearly onstrated by his adoption in toto of a qualification rt (Ex. 324) formerly used by appellant in a home study rse for practical nursing which he had previously operated. libit 324 was changed as to caption only and used as a diffication chart for individuals who were to be trained et specialists, inspectors, turbo prop specialists and

During the course of the trial approximately twenty-four viduals, who had enrolled in the course testified that initially became acquainted with Babson's variously

Lysts.



ned schools upon receipt of a business reply card llar to Exhibits 17, 18, and 19, which they found in ar mail box, on their windshield, or in supermarkets. t of these student witnesses testified they mailed these iness reply cards back to the addressee and thereafter e contacted by registrars, at which time they were told the salesman many of the false representations concerning course, the lessons and their future which induced them enroll in the course. Babson having authored or approved se fraudulent and false business reply cards and letters taining fraudulent misrepresentations and thereafter Ing sent them under his signature or the signature of cials of his schools, it goes without saying that the ord in this case clearly establishes that Babson coned with others named in the indictment to defraud the ic and the fraud was initially conceived against the ic through the use of the United States mails, all of h was in violation of Title 18 U.S.C. Section 1341.

COLLOQUY BETWEEN THE FOREMAN OF THE JURY AND THE COURT, MHELD IN OPEN COURT, PURSUANT TO A REQUEST OF THE JURY, FOR FURTHER INSTRUCTIONS, AND ATTENDED BY ALL PARTIES, DOES NOT VIOLATE ANY SUBSTANTIVE OR PROCEDURAL RIGHT OF APPELLANT.

E.

During the course of jury deliberation, the jury idressed a request to the Court to be allowed to receive pplemental instructions from the Court. The Court anted the request. (Record, p. 1691).

Supplemental instructions were given. The Court then ked the jury whether there was anything further in the y of instructions desired. The foreman asked a question out conspiracy and the Court gave some additional incuctions about conspiracy. (Record, p. 1693). The Court in again asked if there was anything further. The foreman asked if there was anything further. The foreman asked in the consultation with other jurors told the Court:

b." (Record, p. 1693). Appellants assign this procedure terror.

The procedure of recalling the jury for further tructions has always been held to be within the discretion the trial Court. Allis v. United States, 155 U.S. 117 94). This Court has followed the Allis rule. In en v. United States, 186 F. 2d 439 (1951), a mail fraudal, the jury had deliberated twenty-four hours and uested additional instructions through the foreman.

3 Court, noting inter alia, that the supplemental tructions tended to be to Appellant's advantage,

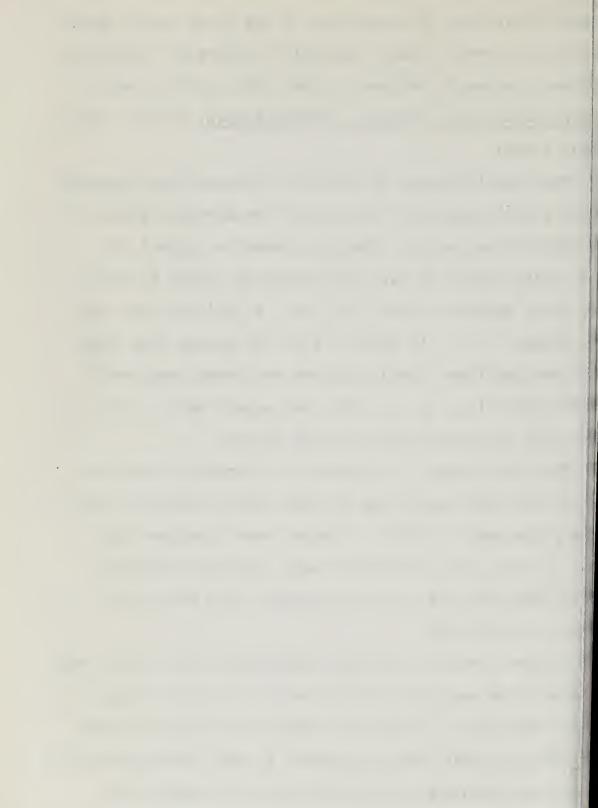


ercise discretion in presenting to the Court points which devoid of merit. See: Mitchell's review of "Effective bellate Advocacy", 64 Harv. L. Rev. 350, at 352, and therm Securities Company v. United States, 193 U.S. 197, 1-401 (1903).

This specification of error is bottomed upon colloquy ween trial counsel for Babson and the District Judge at the 1692 of the record. Whereas counsel on appeal for son states that the jury "proceeded to confer in open but for a period of time" (Op. Br., p. 21) and that the full Judge, " . . . in effect, told the jurors that they had then and there openly discuss and reveal any areas lifficulty" (Op. Br., p. 22), we suggest this is an warranted characterization of the record.

The trial Judge, in response to counsel's objection the jury was conferring in open court, stated to the rary (Record, p. 1692). Counsel never assigned the per as error when invited to make objections (Record, 594-1696) nor was the subject again ever mentioned pord, p. 1691-1696).

Counsel seeks to unfairly characterize the record when states there was "an instruction that the jury engage cen conference." The short portion of record between to 1692 and 1696 lends no support to this characterization not surprisingly, counsel is unable to support the position urged as error with a case of any vitality.



THE GIVING OF SUPPLEMENTAL INSTRUCTIONS RELATING GENERALLY TO CONSPIRACY DOES NOT REQUIRE THE COURT TO ALSO RE-INSTRUCT THE JURY ON OTHER PRINCIPLES OF LAW APPLICABLE TO THE CASE, ESPECIALLY IN THE ABSENCE OF PROPER OBJECTION THERETO.

Specification of Error 4 of Appellant Babson is that
Trial Judge erred, after the giving of supplemental inactions as to conspiracy, in not proceeding to give further
cructions on "reasonable doubt" and other instructions
prable to the defense.

The Court need not reach this assigned error on appeal, ppellant Babson stands convicted on sixteen counts in tion to the one to which the Specification of Error relates the sentence imposed by the Court is within the allowable t for any one count. Thus, the Court may consider the iction as proper on any count and need not consider the ification herein as to count one. Russell v. United States, F. 2d 520 (9 Cir. 1963); Sherwin v. United States, Unreported Cir. No. 18,200, decided June 11, 1963.

The instructions requested and given pertained only to one, the conspiracy count, and the Court told the jury as to the other counts they were to proceed independently seess them. (Record, p. 1693).

However, should the Court proceed to an examination of Specification of Error, it should be noted that consideration appeal -- on the ground stated by appellant -- is barred



ause of failure to comply with Federal Rules of Criminal cedure, Rule 30. Although counsel states, in the opening ef;

"(The Court) Refused to instruct again upon 'reasonable doubt' and other instructions favorable to the defendant's."

Opening Brief, page 17, a casual reading of the colloquy ween trial counsel and the Court shows to the contrary:

"MR BURNS: Before Your Honor leaves the bench---

THE COURT: Just a moment. It may be counsel has some suggestions.

MR BURNS: No, I am just requesting that before Your Honor leaves the bench and after the jury retires again to deliberate, that we would like to make a remark to Your Honor.

THE COURT: If it has to do with any of the instructions thus far given to the jury, I will ask for exceptions now so that I may---

MR BURNS: I don't think they should be made in the presence of the jury, Your Honor.

THE COURT: All right, go ahead."

Record, pp. 1693-1964.

There was no unequivocal request for any charge relattoreasonable doubt, presumption of innocence or "other ructions favorable to the defendant." "A suggestion" is honor was the opening gambit and the actual request to the indictment and define further the acts necessary for piracy. (Record, pp. 1693-1694).



Under these circumstances the Court should not consider e alleged error. Where, as here, the supplemental instructors also contained the Court's statement that all of the ements of conspiracy must be proven beyond a reasonable ubt (Record, p. 1689) and that the instructions be conlered only as to count one, (Record, p. 1693) it can fely be assumed that the presumption that the jury had mind all the instructions given operates herein and cludes this matter being treated as error under Federal es of Criminal Procedure, Rule 52(b). Compare: Speak v. ted States, 161 F. 2d 562 (10th Cir. 1947), at page 565.

WITH ALL COUNSEL AGREEING THERETO IT IS NOT ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY IN PART BEFORE CLOSING ARGUMENTS AND IN PART AFTER CLOSING ARGUMENTS.

The presentation of evidence in the case was concluded ar noon on October 1, 1962. (Record, p. 1654). Instructors by the Court to the jury were delivered following noon recess. (Record, p. 1656). Closing arguments by unsel were presented on October 2, 1962, and final instructors were given by the Judge to the jury thereafter.

\*\*Cord, pp. 1681-1686). The jury retired to deliberate approximately 2:00 P.M. on October 2, 1962. (Record, p. 8).

All counsel were given opportunity to object to tructions, as to form or procedure, at all stages. At close of the first set of instructions (Record, p. 1678) at the close of the second (Record, p. 1687) no corrects, additions, suggestions or objections of any sort made by counsel. (Record, pp. 1678, 1687).

To this procedure of "split instructions," appeal usel assigns error. (Op. Br., Specification of Error 3, 10-16, and expending the largest portion of the opening if upon the point.)

We respectfully submit the point is without merit.

il counsel (termed "capable" by counsel on appeal, Op.

p. 15, para. 1, line 8) had no objection to the pro
lre, either at the time it took place, or on any

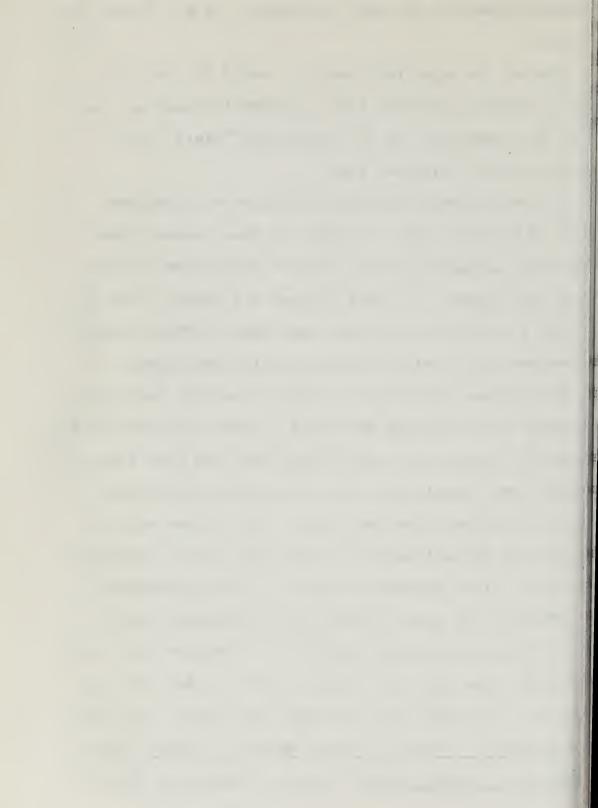


sequent objection to trial procedure. (e.g.: Motion for trial)

Counsel for appellant seeks to avoid the lack of ection below by stating that an objection need not be to such practice, as it constitutes "plain error" or Rule 52(b) F.R.Crim, Proc.

It then becomes appellant's problem to eliminate 30, F.R. Crim, Proc. If Rule 30 does govern, then rror was assigned and the "error" should not be concred upon appeal. If Rule 30 does not govern, then it erely a different procedure than that to which counsel coustomed and should be unassailable upon appeal.

The extreme difficulty in which appellant labors is lighted by his saying that Rule 30 does not apply so as wold its mandate for specifying error and then stating this same inapplicable Rule does apply and demands a edure different from that used. This serves only to light the fallaciousness of the point raised. (Compare 4 Op. Br. last paragraph with p. 15 first paragraph). Finally, the case support for the argument wholly to bring any relevant authority to bear on the issue. Omentary upon the Civil Rules, 25 Va. L. Rev. 261 and Ltrict of Columbia Circuit cases are cited. All three p. Copeland v. United States, Medley v. United States, heeler v. United States, (cited in appellant Babson's



bening brief at page 13,) deal with the reading by counsel the jury of instructions during counsel's argument. The ractice is condemned because of the confusion, as one Court its it, from

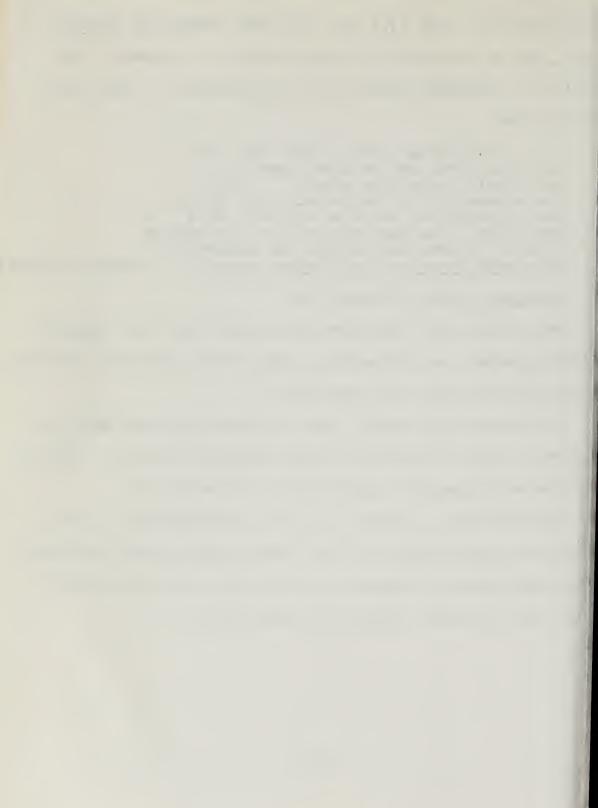
". . .instructions which reach the jury piecemeal from two or more lawyers. . . are likely to be less clear. . . than the elements of a charge which the judge has organized or which he delivers from the bench. The jury may fail to distinguish clearly between instruction and argument, when both come from or through counsel..." (emphasis added)

This same court then went on to hold that since counsel a not objected, no substantial right of the defendant had been blated and affirmed the conviction.

Copeland, supra, at page 769.

We respectfully submit that the reading by the Judge to
plury of the instructions in two distinct segments, with the
acurrence of counsel, constitutes no error at all.

We note that in respect to this specification of error to the specification of error complaining of the substance the supplemental instructions that appellant Trial failed join with appellant Babson in urging error.



WHERE APPELLANT VICTOR J. TRIAL WAS CHARGED WITH SUBSTANTIVE COUNTS OF MAIL FRAUD WITHIN FIVE YEARS OF THE RETURN OF THE INDICTMENT AND OF PARTICIPATING IN A CONSPIRACY BEGINNING PRIOR TO FIVE YEARS BEFORE RETURN OF INDICTMENT BUT ENDING WITHIN THE FIVE YEAR PERIOD, THE STATUTE OF LIMITATIONS DOES NOT BAR PROSECUTION.

Appellant Trial specifies as error the conviction on nts 1, 16 and 20 as being barred by the statute of itations. (Op. Br. for Trial, pp. 11-13).

The limitation of actions for mail fraud is five years,  $\frac{22}{}$  le 18 U.S.C., Section 3282.

The conspiracy is alleged to have begun on or about cuary 1, 1956, and continued to and including November 1, well within the statute of limitations.

Appellant is charged with having participated in the spiracy charged in count 1 and of having committed ain overt acts in connection therewith. The conspiracy limited well into the applicable limitations period, and 1 did not withdraw from the conspiracy. (See: Statement acts, p. 12).

It is only necessary that it be shown the conspiracy ted within the applicable limitations period and that wert act in furtherance thereof was committed during applicable limitations period. (See: unanimous opinion, his point, of the Court in <u>Grunewald v. United States</u>, J.S. 391, 394-5 (1957). This criteria is met. See:



Appellant Trial, having once joined the conspiracy, id not withdraw therefrom and cannot for the first time 1 appeal, argue that he did so as to "cut off" his iability.



## CONCLUSION

We respectfully submit that the judgment of conviction to each appellant be affirmed.

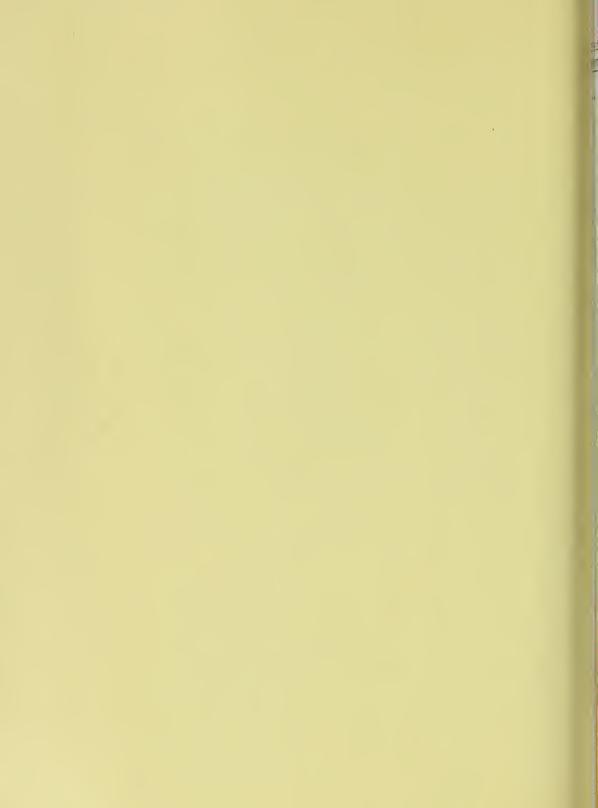
Respectfully submitted,

CECIL F. POOLE United States Attorney

FREDERICK J. WOELFLEN
Assistant United States Attorney

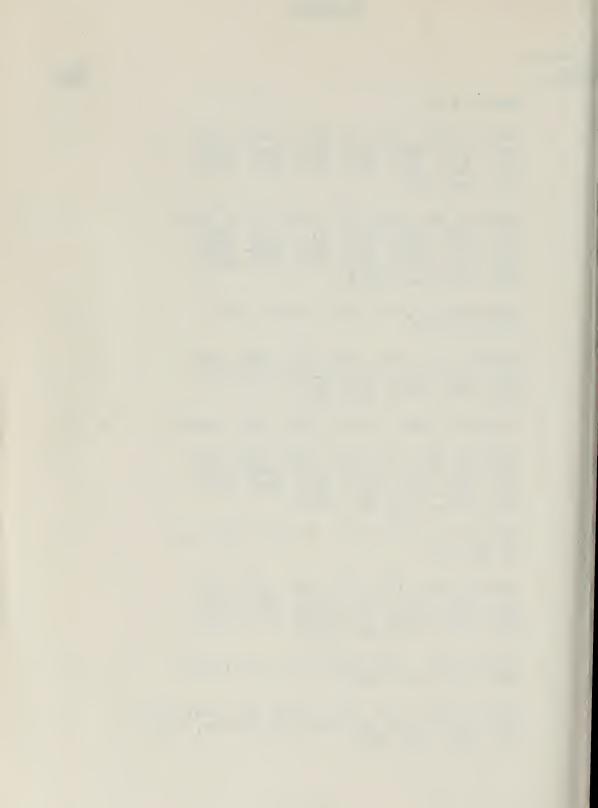


APPENDIX

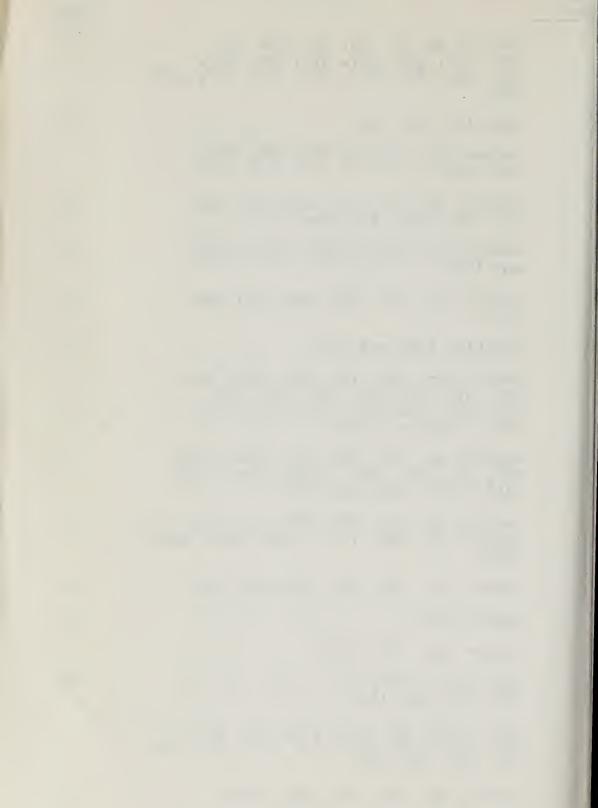


## APPENDIX

erence		D =
iber	Trabibit 60	Page
	Exhibit 62.	3
	Record, pp. 73, 99, 127, 144, 183, 346, 366, 488, 495, 523, 540, 571, 609, 627, 642, 657, 673, 692, 888, 917, and 994.	4
	Record, pp. 100, 109, 128, 145, 154, 167, 178, 188, 233, 271, 303, 324, 368, 474, 489, 496, 523, 529, 541, 591, 609, 618, 642, 643, 674, 692, 889, 927, and 1638.	14
	Exhibits 14, 17, 23, 30, 43, 171, 271 and 277.	5
	Record, pp. 77, 110, 132, 148, 170, 190, 273, 370, 530, 542, 574, 619, 629, 693, 704, 719, 891	
	Exhibits 18a, 19, 20, 23, 24c, and 61.	5
	Record, pp. 77, 127, 132, 190, 272, 369, 423, 452, 497, 524, 543, 560, 573, 592, 605, 659, 667, 676, 910, 918, 925, 1019 and 1024.	
	Exhibits 14, 17, 24, 27, 30, 40, 43, 54 and 57.	5
***	Record, pp. 78, 100, 131, 137, 190, 235, 278, 291, 304, 330, 335, 497, 524, 574, 592, 619, 629, 673, 693, 704, 718, 1382 and 1398.	
1	Record, pp. 110, 115, 143, 151, 169, 186, 473, and 1068.	5
1	Record, pp. 110, 191, 273, 325, 497, 513, 543, 575, 592, 593, 601, 611, 644, 659, 677, 694, and 896.	



ference		
Imber		Page
)	Record, pp. 77, 82, 83, 134, 195 238, 275, 326, 347, 478, 506, 531, 573, 593, 620, 628, 645, 694, 717, and 815.	5
	Exhibits 315, 322.	6
	Record, pp. 71, 98, 126, 384, 672, and 1391.	
. 1	Record, pp. 90, 115, 203, 237, 304 334, 535, 663, 690, and 707.	6
2,	Record, pp. 1094, 1153, 1154, 1174, and 1510.	6
3	Record, pp. 101, 348, 499, 501 and 595.	6
4	Exhibits 158a and 162.	7
	Record, pp. 105, 111, 122, 350, 351, 376, 377, 391-394, 457, 501, 502, 516, 596, 630, 660, 677, 721, 755, 1007, 1395 and 1396.	
5	Record, pp. 108, 349, 747, 748, 749, 768, 943, 949, 963, 1095, 1100, 1154, 1156, 1167, 1179 and 1180.	7
5.	Record, pp. 162, 576, 579, 631, 635, 705, 1154, 1166-1168, 1176, 1178, 1180, and 1183.	8
7.	Record, pp. 162, 579, 631-633, 705.	8
3.	Exhibit 244.	8
	Record, pp. 736, 1140.	
).	Exhibits 23, 28, 43, 54, 57, 61, 73, 147, 148, and 161.	8
	Record, pp. 78, 110, 131, 149, 171, 191, 254, 273, 323, 360, 574, 598, 604, 629, 693, and 925.	
).	Record, pp. 769, 961, 962, 1621.	9
	-36-	



Page Record, pp. 1476, 1491, 1552, 1569, 1570, 1575, 1588, 1602, and 1642. 9 The limitations period was originally 32 three years. 62 Stat. 828 (June 25, 1948). The section was amended in 1954 to provide a five year period. 68 Stat. 1145 [See: 1214, Section 12(a), formerly Section 10(a)], then renumbered on September 26, 1961, in 75 Stat. 648. five year limitation was made applicable for offenses committed on or after September 1, 1954. 68 Stat. 1145. A defense that the statute of limita-33 tions bars the offense should be raised at the District Court level before trial and at trial. This was not done in the present case. Particularly where the question might be one of withdrawal from a conspiracy, the facts surrounding such action must be presented to the jury and a chance given to the Government to meet the issue. United States v. Dierker, 164 F.Supp. 304 (D.C. Pa. 1958).



## IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

	BABSON TRIAL,	and		
	Appellants,			

V.

TED STATES OF AMERICA,

Appellee.

NO. 18410 AFFIDAVIT OF SERVICE BY MAIL

MED STATES OF AMERICA

HERN DISTRICT OF CALIFORNIA

SS

FREDERICK J. WOELFLEN, being first duly sworn, deposes isays:

- 1. That on September , 1963, he deposited in the ed States mails, San Francisco, California, in the se entitled action, an envelope bearing Air Mail Special very postage and containing a copy of Consolidated e of Appellee, addressed to: James W. Heyer, Esq., e Building, 1700 Broadway, Denver 2, Colorado, Attorney ppellant Archie K. Babson, this being the last known rss of the counsel for Appellant and at which place q is a delivery service by United States mails from d Post Office.
- 2. That on September , 1963, he deposited in the td States mails, San Francisco, California, in the ve entitled action, an envelope bearing First Class



cial Delivery postage and containing a copy of solidated Brief of Appellee addressed to: James G.

lis, Esq., 225 Bush Street, San Francisco 4, California, orney for Appellant Victor J. Trial, this being the t known address of the counsel for Appellant and at ch place there is a delivery service by United States 1s from said Post Office.

FREDERICK J. WOELFLEN
Assistant United States Attorney

cribed and sworn to before this \_\_\_\_ day of September, 1963.

k, United States Court of Appeals the Ninth Circuit

